
WC Docket No. 16-106 / FCC 16-39

COMMENTS
of
WASHINGTON LEGAL FOUNDATION
to the
FEDERAL COMMUNICATIONS COMMISSION
Concerning
**THE PROPOSED RULE ON PROTECTING THE
PRIVACY OF CUSTOMERS OF BROADBAND
AND OTHER TELECOMMUNICATIONS
SERVICES**

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT 81 FED. REG. 23359 (April 20, 2016)

Mark S. Chenoweth
Cory L. Andrews
Jared McClain
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

May 27, 2016

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

May 27, 2016

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Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
WC Docket No. 16-106
445 12th Street, SW
Washington, DC 20554

**Re: Comments Concerning Proposed Rule on Protecting the Privacy of
Customers of Broadband and other Telecommunications Services**
WC Docket No. 16-106 / FCC 16-39
81 Fed. Reg. 23359 (April 20, 2016)

Pursuant to the public notice published at 81 Fed. Reg. 23359 (April 20, 2016), Washington Legal Foundation (WLF) submits these comments to the Federal Communications Commission (FCC or Commission) on the agency's proposed rule for protecting the privacy of customers of broadband and other telecommunications services (Proposed Rule or Rule).

In short, WLF believes that FCC's Proposed Rule both exceeds the Commission's statutory grant of authority and conflicts with more explicit provisions in the Commission's governing statutes. Moreover, by singling out for burdensome regulation the marketing activities of broadband Internet service providers (ISPs), the Proposed Rule constitutes a content- and speaker-based restriction that discriminates against ISPs in violation of the First Amendment. Ultimately, FCC's *ultra vires*, unconstitutional, and misguided attempt to "protect" consumer data will not even achieve its desired effect. Rather, it will raise consumer costs and slow broadband deployment without providing customers anything more than a false sense of privacy.

I. Interests of WLF

WLF is a public-interest law firm and policy center based in Washington, DC, with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears before state and federal courts and administrative agencies to ensure that those agencies adhere to the rule of law. *See, e.g., In the Matter of Applications of Charter Communications Inc., et al.*, MB No. 15-149 (Oct. 15, 2015) (urging against FCC’s proposed release of companies’ proprietary information absent a “persuasive showing” that the information was a “necessary link” to resolving a proceeding); *Tennessee v. FCC*, No. 15-3291 (6th Cir., dec. pending) and *North Carolina v. FCC*, No. 15-3555 (6th Cir., dec. pending) (challenging FCC’s authority to order North Carolina and Tennessee to operate expanded ISPs); *U.S. Telecom Assoc. v. FCC*, 15-1063 (D.C. Cir. 2015) (challenging FCC’s authority under § 706 of the Telecommunications Act to regulate the Internet).

In addition, WLF’s Legal Studies Division, the publishing arm of WLF, frequently produces and distributes articles on a wide array of legal issues related to FCC regulation. *See, e.g.,* Thomas R. Julin, *Confronting Online Privacy Regulation: Time to Defend the First Amendment*, LEGAL BACKGROUNDER (May 27, 2016); Jay B. Stephens, Commissioner Ajit Pai, & David Parkhurst, *Federal Preemption vs. State Authority over Municipal Broadband*, CONVERSATIONS WITH (Autumn 2015); Rosemary C. Harold, *CBS Corp. v. FCC: Business Confidentiality Trumps Broader Agency Disclosure at D.C. Circuit*, LEGAL OPINION LETTER (July 31, 2015).

II. The Proposed Rule

The Proposed Rule effectively outlaws ISPs’ use of commercial data for most marketing purposes. Purporting to offer “concrete guidance explaining the privacy responsibilities created by the Communications Act,” NPRM at 2, FCC claims the Rule will promote privacy through transparency, choice, and data security. Yet FCC’s Proposed Rule applies only to ISPs and not edge providers, which make up a sizeable share of the Internet market. The Proposed Rule does much more than simply require ISPs to secure customer data and provide consumers with privacy notices. It includes an elaborate number of mandates: risk-management assessments; employee-training programs; appointing a corporate officer in charge of due diligence; customer right-to-access protocols, including robust customer-authentication requirements; limitations and restraints on the collection, retention, and disposal of data; and data-breach notification requirements, including notification to both consumers and the Government.

Even more troubling than its vast and burdensome compliance regulations, the Proposed Rule also restricts ISPs' right to market de-identified aggregate customer data, and requires ISPs to allow customers to opt in or opt out of various standard industry uses of that data. Further burdening free enterprise, the Proposed Rule contemplates limiting the ability of ISPs to shift costs that would arise from compliance with the Rule by offering services conditioned on the waiver of privacy rights or offering customers a financial incentive to remain in the current data program. The Rule even goes so far as to consider not allowing providers to charge customers an increased price if they opt out of the data collection program.

The Proposed Rule then extends its strictures to cover this wider reach of information not found in the governing statute by "interpreting" a definition. The Rule interprets the definition of Customer Proprietary Network Information (CPNI) to include newly created categories: Customer Proprietary Information (PI) and Personally Identifiable Information (PII). The Proposed Rule also expands the Commission's reach over aggregate customer information.

III. FCC Lacks Statutory Authority to Implement Its Proposed Rule

When Congress intends to empower the Commission to prescribe or proscribe certain conduct under the Communications Act, it does so expressly. *See, e.g.*, 47 U.S.C. § 205(a) ("[T]he Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge"); *id.* ("[T]he Commission is authorized and empowered ... to make an order that carrier or carriers shall cease and desist from such violation."). The Act explicitly states the circumstances where the Commission may impose affirmative compliance enforcement penalties. *See, e.g.*, 47 U.S.C. § 209 ("[T]he Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled."); 47 U.S.C. § 503(b)(1) ("Any person who is determined by the Commission ... to have ... failed to comply with any of the provisions of this Act ... shall be liable to the United States for a forfeiture penalty.").

Yet, lacking an explicit statutory grant here, FCC instead flimsily relies on what Judge Silberman has described as "emanations from the penumbra" in citing no fewer than five statutory provisions (and seeking comment on two more) for its claimed authority to implement the Proposed Rule. *See* Proposed Rule at 294 ("Taken together, these statutory provisions give us the authority and responsibility to ensure that telecommunications carriers ... protect the confidentiality of private customer information and give their customers control over the carriers' use and sharing of such information."); *cf. Verizon v. F.C.C.*, 740 F.3d 623, 660 (Silberman, J., concurring in

part) (“‘Emanations from the penumbra’ may once have served to justify constitutional interpretation, but it hasn’t caught on as legitimate statutory interpretation.”).

FCC seeks to ground its legal authority to implement the Proposed Rule in §§ 201, 202, & 222 of the Communications Act of 1934 and §§ 705 & 706 of the Telecommunications Act of 1996. *See* NPRM at ¶ 294. But *none* of the statutory provisions upon which FCC relies authorizes it to regulate ISPs, much less to implement the overly broad regulatory regime at issue here. Mindful of this inconvenient fact, FCC apparently believes that if it merely cites enough possible sources of statutory authority—if it grasps at enough straws—then a reviewing court may be more likely to defer to the agency on review. But no amount of thin reeds will save the agency’s argument. Even a minimal level of scrutiny reveals that each of the statutory provisions cited fails to grant FCC its claimed authority.

If FCC can effectively re-write these statutes to create an extra-legal privacy regime, then it is difficult to imagine what limiting principle would remain for preserving the rule of law. The resulting regime would not only subject ISPs to FCC’s regulatory whims, but it would do so at their customers’ expense.

A. § 222

The Commission’s reliance on § 222 is misplaced. To conjure up a grant of authority, FCC expands the statute’s reach and application far past its explicit language, as well as its original scope and purpose. In doing so, FCC not only fails to read § 222(a) in conjunction with § 222(c), but also interprets § 222 in a way that contradicts explicit mandates elsewhere in the Act. This approach violates basic tenets of statutory construction, which “is a holistic endeavor.” *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”); *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002) (“The meaning of a particular section in a statute can be understood in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another. In other words, the preferred meaning of a statutory provision is one that is consonant with the rest of the statute.”).

Section 222(a) provides: “In General – Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including

telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.” The Commission misconstrues § 222(a) as a freestanding grant of authority independent of subsections (b) and (c). Section 222 must not be read in isolation, but in conjunction with its other provisions. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *N.L.R.B. v. Loc. 450, Intl. Union of Op. Eng., AFL-CIO*, 275 F.2d 408, 412 (5th Cir. 1960) (“[T]he fact that the construction given to it brings it in conflict with other provisions of the statute is strongly persuasive of the need for finding a different meaning for the words.”). Considering the statute’s structure as a whole, subsection (a) concerns the types of companies over which the Act applies, while subsections (b) and (c) specifies, respectively, the types of carriers and customers whose proprietary information the Act covers. 47 U.S.C. § 222. Reading the statute as a whole, then, it makes sense that (a) speaks generally of proprietary information since (b) and (c) both refer to different types of proprietary information. There is no indication that Congress intended for (a)’s general phrasing to surreptitiously grant FCC far-reaching authority to regulate all sorts of information not considered by the specific language delineated in (b) and (c). In fact, Congress wrote and enacted § 222 to “balance both competitive and consumer privacy interests *with respect to CPNI* [Customer Proprietary Network Information].” H.R. Rep. No. 104-458, at 205 (1996) (Conf. Rep.) (emphasis added).

Despite § 222(h)(1)’s explicit limitation on the information covered by the statute, the Proposed Rule purports to set forth entirely new categories of covered information. Although in previously explaining the scope of § 222(a) FCC has acknowledged that carriers collect certain data that “is not CPNI,” *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Declaratory Ruling, 28 FCC Rcd 9606, 9617, para. 24 (2013), it now fails to recognize that if data is not CPNI, then § 222 is inapplicable. Instead, the Commission relies on the generalized use of the term “proprietary information” in § 222(a)—a provision entitled “In general.” 47 U.S.C. § 222(a). But subsection (a)’s generality dictates that it must give way to the statute’s more specific provision on point, namely § 222(c)—a provision entitled “Confidentiality of Customer Proprietary Network Information.” 47 U.S.C. § 222(c); *see Bloate v. United States*, 559 U.S. 196, 207 (2010) (“A specific provision ... controls one of more general application.”). The Commission may not read one general term in isolation as a means to supplement the definition of CPNI specifically limited by § 222(c).

Nor may FCC construe any generality or ambiguity in § 222 in a way that contradicts other, more explicit, statutory mandates within the Act. Having previously conceded that it may not read a provision of a governing statute in a way that “trump[s] specific mandates of the Communications Act,” *Open Internet Order*, 25 F.C.C.R. at 17969 ¶ 118, FCC attempts to do just that here. The vast, costly regulatory regime envisioned by the Proposed Rule is sure to increase customer cost and discourage broadband investment by ISPs. That result directly contradicts Congress’s explicit mandate in § 706 that FCC “encourage the deployment ... of advanced telecommunications capability ... by utilizing ... measures that promote competition in the local telecommunications market, or other regulating methods that *remove barriers to infrastructure investment*.” 47 U.S.C. § 1302(a) (emphasis added). Rather than encouraging investment and broadband deployment, the Proposed Rule will disincentivize these stated goals by increasing costs for ISPs, which in turn will increase the costs to customers. Simply put, FCC may not expand its reading of § 222 beyond the text of that statute in derogation of § 706.

Notwithstanding the very real conflict between FCC’s claimed authority in § 222(a) and the remainder of the Act, FCC’s reading of § 222 is, in and of itself, wholly without merit. By impermissibly interpreting § 222(a) as an independent and seemingly limitless grant of agency power over anything and everything related to “proprietary information,” FCC ignores the statute’s history, explicit language, definitions, and internal constraints. Even if FCC may regulate ISPs’ CPNI under § 222(c), that provision cannot possibly authorize the Proposed Rule’s regulation of Customer Proprietary Information (PI), which FCC defines to include *all* personally identifiable information. *See* NPRM at 57-66. Yet the Proposed Rule expands FCC’s reach far beyond CPNI—a term Congress specifically defined in § 222(h)(1). *See* 47 U.S.C. § 222(h)(1).

Similarly, FCC may not regulate aggregate customer PI beyond the limitations set forth in § 222(c)(3), which provides that carriers must provide aggregate customer information on reasonable and nondiscriminatory terms or conditions upon request. *See* 47 U.S.C. § 222(c)(3); NPRM at 74. Congress has conferred no additional authority to FCC to enact other regulations on aggregate information, or to broaden the term’s explicit statutory definition. Yet the Proposed Rule expands § 222(h)(2)’s definition to apply to the “use of all aggregate customer PI and not just aggregate CPNI.” NPRM at 74. FCC also proposes a new opt-out/opt-in regime that is entirely without statutory basis and will impose significant cost and restraints on ISPs. This overreach is particularly troubling since de-identified CPNI is no longer individually identifiable and, therefore, no longer subject to § 222(c)(1). *See* 47 U.S.C. § 222(c)(1). Through complex processes, the ISPs turn this data into their own proprietary information, which no longer implicates any

perceived individual customer privacy concerns or interests. Consequently, FCC lacks any and all authority to regulate ISPs' de-identified aggregate information.

Finally, § 222's legislative history further undermines the Commission's reliance on it as a grant of authority for the Proposed Rule. While not technically limited to telephone services, § 222's definition of CPNI makes clear that Congress wrote that provision to address concerns unique to telephone records and billing information. *See* 47 U.S.C. § 222(h)(1). It makes little sense to apply § 222 to ISPs' data, which is wholly different in kind. The purpose of § 222(a) "was to extend CPNI rules to all telecommunications carriers, not just AT&T, the BOCs, and the GTE." Dissenting Statement of Commissioner Michael O'Rielly, *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325 (2014). Congress enacted § 222 to address competition within the telecommunications market, not to address Internet data privacy. Put simply, § 222 does not grant FCC the authority the agency claims because the statute was written to govern the collection of a different type of information by an entirely different industry. While FCC has a certain amount of leeway to interpret ambiguities in its governing statutes, here it has "stray[ed] so far from the paradigm case as to render its interpretation unreasonable, arbitrary, or capricious." *Nat'l Cable & Telecomm. Assoc. v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009).

B. § 706

For many years since § 706's enactment, FCC recognized that the statute "'does not constitute an independent grant of authority.'" *Comcast*, 600 F.3d at 658 (quoting *Advanced Services Order*, 13 F.C.C.R. at 24047 ¶ 77); 13 F.C.C.R. at 24044 ¶ 69 ("[S]ection 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods.*") (emphasis added). Then, in defending its first *Open Internet Order* from legal challenge, FCC changed its tune. *See Verizon v. F.C.C.*, 740 F.3d 623, 637 (D.C. Cir. 2014) (quoting *Open Internet Order*, 25 F.C.C.R. at 17969 ¶ 119 n.370) ("[W]e reject that [earlier] reading of the statute."). Although FCC attempts to rely on language in *Verizon* stating that § 706 "furnishes the Commission with the requisite authority to adopt the regulations," 740 F.3d at 635, that portion of the D.C. Circuit panel majority's opinion is dicta. The majority's discussion of § 706 was not necessary to the Court's holding striking down FCC's anti-blocking and anti-discrimination rules. Nor was it relevant to the Court's decision to sustain the transparency rule (because FCC never relied on § 706 for that rule).

Even taken at face value, the D.C. Circuit's dicta in *Verizon* does not justify the Proposed Rule. *Verizon* cautioned that Congress would not have granted FCC affirmative

rulemaking authority through § 706 if “that authority would have no limiting principle.” *Verizon*, 740 F.3d at 639; *Id.* at 640 (“Section 706(a) thus gives the Commission authority to promulgate only those rules that it establishes will fulfill this specific statutory goal—a burden that ... is far from meaningless”); *id.* at 639 (quoting S. Rep. No. 104-23 at 50-51) (“The Senate Report describes section 706 as a ‘necessary fail-safe’ ‘intended to ensure that one of the primary objectives of the [Act]—to accelerate deployment of advanced telecommunications capability—is achieved.’”). This limiting principle, FCC conceded and the court held, is to “encourage the deployment” of broadband “by utilizing ... regulating methods *that remove barriers to infrastructure investment.*” *See id.* at 640 (quoting 47 U.S.C. § 1302(a)). In other words, § 706 in no way empowers FCC to regulate ISPs in any way that fails either to encourage broadband deployment or remove barriers to investment. This is consistent with the statute’s preamble, which further confirms that the 1996 Act’s purpose was “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Pub. L. No. 104-104, Title VII, 110 Stat. 56 (Feb. 8, 1996).

The Proposed Rule strays far past that recognized limitation on FCC’s authority. Even in the *Open Internet Order*, where the agency proffered an attenuated theory for why more regulation would somehow encourage increased investment in broadband, the agency described the connection between its order and governing statute as a “triple-cushion shot.” *Verizon*, 740 F.3d at 643. Here, without bothering to even call a pocket, the Commission fires the cue ball blindly around the table, scratching its shot. Without regard for a statute’s limiting principles, an agency’s unexplained departure from its longstanding interpretation of its own statutory authority “is likely to reflect the agency’s reassessment of wise policy rather than a reassessment of what [Congress] itself originally meant.” *Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 682 (6th Cir. 2005).

Rather than accomplish § 706(a)’s statutory goal, the Proposed Rule undermines it. The unprecedented level of regulation of ISPs’ proprietary information and advertising will discourage the investment in and deployment of broadband. If FCC similarly singled out the cable television industry and required it to allow all viewers to opt out of commercial breaks during programming, everyone would expect the upfront cost of cable to increase, the investment in such programming to decrease, or both. So it is unclear why FCC believes those basic rules of economics don’t apply with equal force to broadband providers.

If enacted, the Proposed Rule's vast regulatory structure, with its data security, monitoring, and various compliance costs, would significantly increase the cost of broadband. Similarly, the opt-out/opt-in regime regulating marketing would depress ISPs' bottom-line profits. Assuming those providers are rational economic actors, the Commission should fully expect them to pass along these increased costs to consumers in order to compensate for lost advertising profits. FCC implicitly acknowledges this point by inviting comment on whether it should enact corresponding price controls to prevent ISPs from charging higher prices to those customers who opt out. NPRM at 256. But in that scenario, providers would have to increase rates for *all* customers to cover the added cost of providing service to this newly protected class of customers. In other words, FCC's misguided attempt to address the privacy concerns of some ISP customers would require those customers lacking any privacy concerns to subsidize the cost of those customers who choose to opt out. Hence, even putting aside the economic illogic of price controls, FCC should eschew such cross-subsidization. In all events, price controls—much like rent controls—are a sure recipe for constraining supply rather than expanding access to broadband.

This is especially problematic when one considers the possibility that many customers may only think their privacy is at risk because FCC proposed a rule implying that was the case. In effect, the Proposed Rule may have the perverse effect of creating a customer demand for increased privacy, but only offer a façade that leaves customers feeling more secure than they actually are. Because the Proposed Rule does not apply to edge providers—the primary collector of customer data—and because most customers regularly access the Internet through a variety of networks and devices, a multitude of companies will still be collecting, aggregating, studying, and selling customer data.

C. The Remaining Provisions Cited by FCC Do Not Authorize the Proposed Rule

FCC offers little to no explanation for how the other statutory provisions it cites supply the Commission with the authority necessary to implement the Proposed Rule. For example, § 706(b) only empowers FCC to enact regulation in response to an inquiry that finds advanced telecommunication capability is not “being deployed to Americans in a reasonable and timely fashion.” 47 U.S.C. § 1302(b). But WLF is aware of no such inquiry undertaken pursuant to § 706(b), and FCC fails to provide the results of any relevant findings. Accordingly, the Commission cannot rely on this provision for the current Proposed Rule. In any event, § 706(b) directs FCC, after making a finding that broadband is not being adequately deployed, to accelerate deployment in the “unserved areas” described in § 706(c). So, any authority § 706 confers would apply only in

geographic areas where deployment has been deemed inadequate; it obviously does not confer general authority to impose nationwide rules.

Likewise, §§ 201 & 202 date back to 1934 and merely prohibit unjust, unreasonable, or discriminatory practices. 47 U.S.C. §§ 201, 202. Nothing indicates that ISPs' participation in the Internet-data advertising market is in any way unjust, unreasonable, or discriminatory. In the absence of such a showing, this near-century-old provision has no applicability to the Proposed Rule's subject matter. Simply put, § 201(b) cannot serve as a catch-all source of authority for anything "in connection with" communications that the Commission desires to regulate. Nonetheless, FCC seems to think that the more fallback provisions it names, the better chance a reviewing court may swallow an alternative justification for the Commission's authority.

IV. The Proposed Rule Runs Afoul of the First Amendment

The Proposed Rule constitutes a speaker- and content-based burden that violates ISPs' First Amendment rights, both by restricting their commercial speech and by compelling their speech when they would otherwise prefer not to speak. The restriction is speaker-based because it targets only ISPs and not their crowded field of competitors in the Internet-marketing arena. The restriction is content-based because the Proposed Rule would restrict providers' speech based on the type of data they package and sell. Such restrictions are subject to heightened scrutiny—a burden FCC cannot meet. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-65 (2011) (applying heightened scrutiny to "content- and speaker-based restrictions"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994) (applying strict scrutiny to regulations that single out disfavored speakers).

As the Supreme Court has recognized, "[t]he capacity of technology to find and publish personal information ... presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of the debate." *Sorrell v. IMS Health Inc.*, 546 U.S. 552, 597-80 (2011); *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010) ("The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."). Nor does the fact that the Proposed Rule purports to regulate only commercial speech somehow insulate it from First Amendment scrutiny. *IMS Health*, 546 U.S. at 566-67 ("While the burdened speech results from an economic motive, so too does a great deal of vital expression."). Simply put, the Government may not justify a ban on truthful speech simply because, in its view, the message will adversely affect its audience. *Id.* at 577 ("[T]he fear that people would

make bad decisions if given truthful information cannot justify content-based burdens on speech.”) (internal quotation marks omitted).

The Proposed Rule is an unreasonable and discriminatory abridgment of ISPs’ First Amendment right to convey truthful information that they have legally collected. It fails both the heightened scrutiny required by *IMS Health* as well even as the intermediate scrutiny demanded by *Central Hudson*.

A. Content- and Speaker-Based Burdens on Speech Are Subject to Heightened Scrutiny

“The First Amendment protects speech and speaker,” *Citizens United*, 558 U.S. at 341, demanding “heightened scrutiny” whenever the Government discriminates against either. *Sorrell*, 564 U.S. at 563-66. The Government bears the burden of demonstrating that any given speech regulation is “narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, [it] must use that alternative.” *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000). The same is true whether the regulation merely burdens speech rather than banning it entirely. *Id.* at 812 (noting that the “distinction between laws burdening and laws banning speech is but a matter of degree” and the “Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans”). In other words, “[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.” *IMS Health*, 546 U.S. at 566.

“Heightened judicial scrutiny” is triggered whenever the Government imposes content-based burdens based on speech. *Id.* at 565; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”). Courts are no less skeptical of such burdens when the targeted content is speech in pursuit of marketing or a commercial transaction. *IMS Health*, 546 U.S. at 557; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (“[S]peech that does no more than propose a commercial transaction is protected by the First Amendment.”). This is because a “consumer’s concern for the free flow of commercial speech often may be keener than his concern for urgent political dialogue.” *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977).

Quite apart from the particular burdens imposed on disfavored content, “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.” *Citizens United*, 558 U.S. at 340; *Turner Broad.*, 512 U.S. 622, 659 (1994) (“Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.”). This makes sense

since, as is the case here, “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Ibid.* Such “differential treatment” cannot be squared with the First Amendment. *Citizens United*, 558 U.S. at 353.

FCC’s Proposed Rule triggers heightened scrutiny because it discriminates based on the content of the speech by singling out the use of consumer data in advertising, but not for any other purpose. FCC’s decision to discriminate against a single type of speech must fail unless it can survive heightened judicial scrutiny. The Proposed Rule likewise discriminates against ISPs while exempting ISPs’ many competitors from the Rule’s regulatory reach. The same speech that is deemed dangerous by one group—sharing consumer data in advertising—is entirely permissible when spoken by another. This is *ipso facto* speaker-based discrimination.

As recently as 2011, the Supreme Court made clear that the First Amendment prohibits the very type of burdens on commercial marketing that the Government attempts to impose here. *See IMS Health*, 564 U.S. at 557 (“Speech in aid of ... marketing, however is a form of expression protected by the Free Speech Clause of the First Amendment,” and the regulation of such “must be subjected to heightened judicial scrutiny.”). *IMS Health* conclusively established that heightened judicial scrutiny applies to commercial speech when the government restriction discriminates on the basis of a particular speaker or content. *Id.* at 565-66. While the Government is free to enact commercial-speech regulations that comport with *Central Hudson*, strict scrutiny applies whenever the Government fails to give a neutral justification for a speaker- or content-based rule that bans or burdens the conveyance of certain information only in marketing or advertising, but not in, for example, “law enforcement operations.” *IMS Health*, 564 U.S. at 560. Any other rule would inexplicably apply less demanding First Amendment scrutiny to direct restrictions on speech than to statutes that impose substantial burdens on speech.

IMS Health struck down a restriction that specifically prohibited the sale and disclosure of pharmacy records for marketing use by pharmaceutical manufacturers. The case helps illustrate why the Proposed Rule violates the First Amendment. Like ISPs’ selling of customer traffic data, many pharmacies sell prescriber-identifying information “to ‘data miners,’ firms that analyze prescriber-identifying information and produce reports on prescriber behavior.” *Id.* at 558. In the name of “safeguard[ing] ... privacy” interests, the State of Vermont sought to prevent the sale of this consumer data without the explicit consent of the prescriber. *Id.* at 557, 559. Vermont’s purported motivation was its concern that the pharmaceutical sales market favored drug manufacturers’ interests rather than drug consumers, *Id.* at 560-61. Similarly, the Proposed Rule

expresses FCC's concern that the Internet-based advertising market is not in customers' best interests, singling out ISPs for restrictions on the type of data they can market to advertisers.

Vermont's law not only "disfavor[ed] marketing, that is, speech with a particular content, but it also "disfavor[ed] specific speakers, namely pharmaceutical manufacturers." *Id.* at 564. "As a result of these content- and speaker-based rules, detailers [could not] obtain prescriber identifying information," and were "likewise barred from using the information for marketing, even though the information may be used by a wide range of other speakers." *Ibid.* Such restrictions "ha[d] the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner." *Ibid.* The Proposed Rule similarly burdens ISPs, preventing them from communicating with advertisers in an effective manner. *Cf. id.* at 558 ("Salespersons can be more effective when they know the background and purchasing preferences of their clientele.").

Ultimately, the Government's proffered justifications of increased privacy and improved public health were insufficient to sustain its overly broad restrictions that were targeted at only one group involved with the advertising market. *Id.* at 572. The Court overturned the rule as an unconstitutional abridgement of free speech under the First Amendment. The fact that the burdened speech was economically motivated did not affect the Court's analysis. *Id.* at 566-67 (holding that "[c]ommercial speech is no exception" and reasoning that "a great deal of vital expression" is economically motivated). The Court found it equally inapposite that the law restricted only the dissemination of facts, because "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* at 570 ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."). And while the Vermont law restricted only marketing sales, the Court held that the law could not be sustained even if the state construed it to prohibit *all* sales of personally-identifiable information. *Id.* at 563.

As *IMS Health* makes clear, allowing the sharing of information for other purposes but prohibiting dissemination of the same information for marketing purposes demonstrates that the information is not as dangerous as the Commission claims. *See* NPRM at 95. In fact, many consumers may prefer their data in the hand of advertisers rather than in the hands of the government. And in *IMS Health*, at least Vermont claimed that its regulations would drive down costs for consumers. *Id.* at 572. That is in stark contrast to the added costs that the Proposed Rule will undoubtedly impose on the broadband market. Whereas Vermont argued that physicians had a reasonable expectation that their prescriber information would only be used for a specific purpose,

here no such expectation exists. Marketing based on aggregate data of customer internet use is, by this point, an accepted fact of life—one that will continue in spite of the Proposed Rule considering it does not reach edge providers, which are the most prominent marketers of such information.

In the end, the proposed opt-in/opt-out regime and other limited exceptions cannot save the Rule, which is sufficiently burdensome to silence truthful speech. *See IMS Health*, 564 U.S. at 566. FCC cannot satisfy heightened scrutiny here because any theoretical, marginal increase in customer privacy that the Proposed Rule may accomplish cannot justify the broad restrictions at hand. FCC offers no valid explanation for discriminating against ISPs while allowing their competitors to continue speaking in the same manner prohibited to ISPs. Similarly, FCC has not shown a compelling interest in prohibiting the free flow of communication between advertisers and companies collecting customer data, nor does the Proposed Rule actually accomplish that end.

B. Compelled Speech

“For corporations as for individuals, the choice to speak includes within it the choice of what not to say.” *Pac. Gas & Elec. v. Pub. Util. Comm’n of Ca.*, 475 U.S. 1, 16 (1986) (plurality opinion); *Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977) (holding that the First Amendment protects the right not to speak). This right not to speak extends to statements of fact as well as political viewpoints. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573-74 (1995) (“[T]hat the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”); *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 797-98 (1988) (“[F]or First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of ‘fact.’”).

The Proposed Rule’s notice and disclosure requirements impermissibly compel ISPs to speak when they would have chosen to remain silent if not for the regulation. A compelled-speech requirement that “[m]andat[es] speech the speaker would not otherwise make necessarily alters the content of the speech,” and thus amounts to “content-based regulation.” *Riley*, 487 U.S. at 795. This type of compelled speech is presumptively unconstitutional.” *Rosenberger v. Rector*, 515 U.S. 819, 830 (1995).

Compelling ISPs to speak through the Proposed Rule’s notice and disclosure requirements imposes a large cost on those providers, putting them at a disadvantage to their market competitors, who are not subject to similar costly restraints. Further, the disclosure of any information pertaining to aggregate data that ISPs must disclose puts at

risk their proprietary information and divulges the data and means of collection and categorization that ISPs find most valuable. This again puts ISPs at a distinct disadvantage with their competitors.

Moreover, there is no indication that these requirements will in any way advance the government's goal of protecting consumer privacy while edge providers are still collecting, packaging, and shopping precisely the same information. If anything, the Government's costly and paternalistic content- and speaker-based compelled-speech requirements will simply create a false sense of privacy among consumers and lead them to be less vigilant in individually protecting their own data.

C. The Proposed Rule Cannot Withstand the Less Exacting Central Hudson Test

Aside from making clear that "heightened judicial scrutiny" applies to regulations like the Proposed Rule that impose content- and speaker-based burdens on free speech, *IMS Health* also made clear that the outcome would be the same under the "commercial speech inquiry" of *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 566 (1980). Under *Central Hudson*, if the commercial speech concerns lawful activity and is not inherently misleading, then the challenged speech regulation violates the First Amendment unless: (1) the government demonstrates a substantial interest; (2) the regulation "directly advances" the asserted interest; and (3) the regulation "is no more extensive than is necessary to serve that interest." *Id.* at 566.

First, the government does not have a substantial interest in banning a truthful message just because, in its view, the message will influence behavior. *IMS Health*, 564 U.S. at 578. ("[T]he fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech.") (internal quotation marks omitted). At their core, content- and speaker-based regulations are nothing more than paternalism, and courts are particularly skeptical of the Government's attempts to restrict speech and expression based on its own perception of what is in people's best interest. Consumers have freely and knowingly conveyed this information to ISPs, and once that information is de-identified and aggregated, consumers—and thus FCC—lack any interest in regulating the way that ISPs use the proprietary information that they develop.

Second, the Proposed Rule cannot advance the government's purported interest "in a direct and material way." *Coors*, 514 U.S. at 487. This prong is "critical" because, without it, the Government "could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1985) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). Indeed, it is insufficient that a restriction "provides only ineffective or remote support for the government's purposes," or if the restriction has

“little chance” of advancing the state’s goal. *Edenfield*, 507 U.S. at 770-71. While the materiality requirement requires more than agency fact-finding devoid of empirical analysis, the Government here does not even have that to offer. FCC simply relies on its own ipse dixit that consumers would be better off with this regime in place. The Proposed Rule fails to demonstrate a legitimate, cognizable harm. FCC offers no proof that its burdensome regulatory regime will actually increase consumer privacy, even on the margins; and, quite fatally, any effect the Rule does have on ISPs will necessarily be immaterial since the discriminatory Rule does not apply to major competitors in the same online market FCC purports to regulate.

Finally, the Proposed Rule is much broader than necessary to “provide customers with clear, conspicuous, and understandable information about their privacy practices.” NPRM at 96. Plenty of conceivable means exist by which the Commission could accomplish its goal of better informing ISP customers of the providers’ privacy practices. But rather than proposing an incremental change that could promote clarity while protecting the ISPs’ constitutional and proprietary rights, FCC has instead concocted a vast and costly regime that promises substantial externalities and unintended consequences.

V. Conclusion

The statutory interpretation FCC offers to justify its Proposed Rule is no better than a fairy tale. Because the Commission lacks statutory authority for the Proposed Rule, which does violence to ISPs’ First Amendment rights, WLF respectfully urges FCC to withdraw the Rule.

Respectfully submitted,

/s/ Mark S. Chenoweth

Mark S. Chenoweth
WLF General Counsel

/s/ Cory L. Andrews

Cory L. Andrews
WLF Senior Litigation Counsel

/s/ Jared McClain

Jared McClain
Staff Attorney